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Products Liability

Friedrich Kessler†

The Problems

So long as manufactured goods reached the ultimate consumer with the help of a single sales transaction, the producer’s liability for defective goods did not present a special problem. A consumer worthy of protection had at his disposal the two basic categories of civil liability: contract and tort. The problem of his remedies, however, became acute with the elongation of the process of manufacturing and distribution.

Both the common and the civil law have experienced difficulties in finding ways of imposing direct liability on the manufacturer in favor of the ultimate consumer or user. The imposition of direct contractual liability was retarded, if not prohibited, by the privity principle developed and adhered to by the classical law of contracts everywhere.1

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The following abbreviations are used in this article for French and German codes, reports, and periodicals:

- AcP: Archiv für die Civilistische Praxis
- BGB: German Bürgerliches Gesetzbuch (C. Heymann 1965)
- BGHZ: Entscheidungen des Bundesgerichtshofs in Zivilsachen (1951-date)
- C. Civ.: French Code Civil (58e ed. Petits Codes Dalloz 1957)
- C. Proc. Civ.: French Code de Procédure Civile (Codes Annotés Dalloz 1910)
- D.H. Jur.: Recueil Dalloz, Recueil Hebdomadaire de Jurisprudence (1924-1940)
- D. Jur.: Recueil Dalloz (1945-1965)
- D.F.: Recueil Dalloz, Recueil Périodique et Critique (1825-1940)
- DR: Deutsches Recht
- RECHT: Das Recht
- REV. TRIM. D.C.: Revue Trimestrielle de Droit Civil
- RGZ: Entscheidungen des Reichsgerichts in Zivilsachen (1880-1945)
- Sem. Jur.: La Semaine Juridique (also titled Juris-Classeur Périodique) (1927-date)
- SeuffArch: Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten (1847-1898)
- S. Jur.: Recueil Dalloz, Recueil Sirey (1791-1964) (titled Recueil Général de Lois et des Arrêts until 1950)
- ZfDR: Zeitschrift für das Gesamt Handelsrecht und Wirtschaftsrecht

The notion that strangers to a contract cannot sue on it was and, in principle, is still widely regarded as a "vérité de bon sens." Contractual transactions will become insecure and too burdensome if the debtor has to take into account the interests of parties other than his own creditor. Warranty liability in particular, supposedly anchored in a sales contract, should accord protection only to the immediate buyer; due to its strict character, it is "too severe to be extended freely." Successive warranties accompanying a string of sales contracts have been regarded under this approach as independent personal obligations, even where the express warranty of the first seller is reiterated in successive sales. Understandably, the privity dogma has prevented...
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direct recovery not only by a sub-purchaser, but also by the user who was not a buyer.
Tort liability as a means of filling the gap was slow in coming, and even when available had prerequisites of its own which hindered recovery. In the common law, for instance, courts were long reluctant to recognize that by assuming a contractual obligation to a buyer, a seller may also incur a duty to observe care for the protection of third parties. Tort liability arising out of breach of contract was limited (at least in the common law) by notions akin to privity. Indeed, it was, and in many countries still is strongly influenced by the requirement that the injury must be directly brought about by the tortfeasor. To hold otherwise, it was felt, might impose crushing burdens on the manufacturer.

The notion that warranties are personal undertakings has not been confined to chattels subject to change. See generally Comment, Manufacturer's Liability for Intangible Harm, 8 STAN. L. REV. 725 (1956), with Glanzer v. Shepard, 233 N.Y. 26, 135 N.E. 275 (1922). Attempts to draw the line in terms of complete nonfeasance as contrasted with misfeasance or the interests involved, are concededly of heuristic value only. Seavey, supra note 2, at 54.

With regard to the argument that non-liability worked great hardship on the crippled coachman, the court in Winterbottom had this to say: "... but that might have been obviated had he made himself a party to the contract." 152 Eng. Rep. at 405.

How difficult it was to overcome the spirit of Winterbottom v. Wright is illustrated by the powerful policy statement of Sanborn, J., in Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 867 (8th Cir. 1903): "... [For the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite
predicated upon fault—an obstacle to recovery still existing in many legal systems. The principles of privity of contract, direct injury and fault constituted and in many countries still constitute most important roadblocks to full and direct recovery against the producer of goods which cause injury. To be sure, common and civil law have always provided for his indirect liability by a process of unraveling the chain of sales backwards. But this method of imposing liability often turns out to be wasteful and may not even be available. The injured buyer's remedy against his immediate seller is an empty right if the latter is insolvent. And, in any case, successful unraveling depends on the intricacies of the various sales laws with their prerequisites to liability (including the possibility of disclaimer). In addition, it may turn out to be a most expensive procedure, since the cost of litigation may be grossly disproportionate to the injury inflicted. In those civil law countries which have not completely succeeded in emancipating themselves from the rules of the Roman law, the process of going back step by step has limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. For the misunderstanding of Winterbottom, see note 48 infra.


a further drawback in that the injured buyer is not given adequate protection so long as his recovery against an "innocent" seller is limited to the aedilitian remedies: the privilege to return defective merchandise or to claim reduction of the purchase price does not compensate him for harm done to his person or property.

The insulation of the manufacturer of defective goods against direct liability dated back to a period when the factor "of personal relationship loomed quite large in the consciousness of law courts." With the advent of mass production and large scale promotion and distribution of goods the prevailing doctrine came under ever-increasing attack.

In the evolution of the producer's direct liability, the roles played by tort and contract law respectively have varied considerably in the different legal systems. Understandably, courts of all countries moved along the line of least resistance, resorting principally to that branch of civil liability which was flexible enough to permit recovery without too radical a break with tradition and principle. Thus, some relied mainly on tort law in order to escape the privity dogma while others have adapted contract law to changing notions of social policy, supplementing it with tort law. And yet, by and large, the notions underlying both fields have suffered considerable modification under the impact of considerations of public policy. Indeed, the distinction between the fields—clearcut under classical doctrine—has been blurred. Hybrid forms have developed where recovery is deemed essential for reasons of public policy, but is not granted either by contract or tort law stricto sensu.

Contract. In the evolution of the contract model, the privity requirement could not coexist with modern methods of marketing which feature direct appeals to the consumer. Courts realized that individual transactions, beginning with the first sale by the producer and ending in the last sale to the consumer, are interrelated, not isolated. The article is not meant to remain in the hands of the intermediate buyer, who often is unable to control and inspect quality and who is typically not the person to suffer injury. Frequently, the merchandise bears a

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15. Wiesacker, Das Bürgerliche Recht, supra note 1, at 12.
17. Bigelow v. Maine Central Ry., 110 Me. 105, 85 A. 395 (1912); Thomas v. Winchester, 6 N.Y. 397, 499-10 (1852). The arguments advanced in the German literature offer a striking parallel to those made in the Winchester case. Latté, supra note 1, at 55. See also Stoljar, supra note 7, at 310.
brand name and is not altered in successive sales transactions. It makes little sense to apply the privity doctrine à outrance and flatly deny protection by direct contract action to the injured consumer. “The remedies of injured consumers . . . ought not to depend upon the intricacies of the law of sales.” Properly understood, privity is only a means of protecting a party guilty of a breach against losses suffered by remote parties which are unanticipated and therefore not included in the calculation of costs.

In their attack on the “citadel” of privity, with the help of the law of contracts, American courts were most resourceful, more so than the courts of other countries, although some of their contributions are quite significant. Aware of the techniques employed in modern merchandising, our courts have tended to find wherever possible a direct warranty running to parties other than the immediate purchasers. Thus, an affirmation of quality prepared or authorized by the manufacturer and contained in purchase orders, factory warranties, “owner’s service certificates,” catalogues, labels and even general advertisements have been treated as express warranties running to the ultimate buyer (who may be required to sign and mail an acceptance card). In this process, the privity doctrine was subtly modified by distinguishing between privity of sale and privity of contract. Some courts treated devices soliciting trade as offers to warrant if the consumer will buy.

19. LATTE, supra note 1, at 50.
20. See generally Pruesse, supra note 11, at 1194; S. WILLISTON, CONTRACTS §§ 909-918 (3d ed. 1964). For the German law, see LATTE, supra note 1; Gernhuber, Haftung des Warenherstellers nach Deutschem Recht, [1965] KARLSRUHER FORUM 1; Lorenz, Warenabsatz und Verbraucherschutz, id. at 8, 14. For the role of the living law made by English trade associations, see the remarks of Scrutton, J., in James Finlay & Co. v. N.W. Kwīk Hoo Tong Handel Mattschappij, [1929] 1 K.B. 400, 411-12.

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Others dispensed with privity altogether, on the theory that "the basis of warranty may be representation as well as contract;"\textsuperscript{23} thus marketing as such would be covered.\textsuperscript{24} Even the distinction between express and implied warranties often insisted upon has become blurred if not obliterated.\textsuperscript{25} The techniques used by American courts have been closely followed in the German literature and may be responsible for German interest in notions akin to representation, although German case law until now has recognized direct contractual liability only in the case of an express factory warranty.\textsuperscript{26} We find also in the German literature the sensible distinction between advertised and anonymous goods. The manufacturer of defective but anonymous goods, it is felt, can hardly be subjected to direct \textit{contractual} liability, since the consumer was not misled by the manufacturer.\textsuperscript{27}

To cut the privity doctrine back still further, the doctrines of agency, third party beneficiary contract, and assignment were creatively employed. American courts sometimes dealt with the middleman as the "agent" of the remote buyer; frequently he was treated as the agent of the manufacturer, even in the teeth of a clause in the franchise or warranty negating the dealer's agency status. The manufacturer thus lost his freedom to control his risk by using the sales rather than the agency system of distribution.\textsuperscript{28}

Third party beneficiary notions were used by common and civil law courts alike to give warranty protection to the consumer, members of his household, and employees.\textsuperscript{29} German case law even developed a new type of third party beneficiary contract differentiating between the primary duty owed only to the promisee and the secondary duty of careful performance owed to all persons affected by faulty performance due to close contact with performance.\textsuperscript{30} Of particular interest to an


\textsuperscript{26} Judgment of Jan. 17, 1940, 163 RGZ 21, 31-32.


\textsuperscript{29} See note 171 and accompanying text infra.
American reader may be the use sometimes made by French courts of the notion of an (implied) assignment when resurrecting the often discussed action directe running from the manufacturer to the consumer—a development all the more remarkable in the light of arguments advanced by Williston and the German Reichsgericht, who have both maintained that the resale of defective goods does not as a rule amount to an implied assignment of the remedy for defects. American products liability law is, indeed, not without its functional counterpart to the French action directe. Some American courts have redefined privity as a “successive relationship in the same thing” and rather daringly have resorted to the notion of a warranty running with the goods. In doing this, they have borrowed notions developed in the law of negotiable instruments and in real estate law, with its covenant running with the land. Similar ideas occasionally can be found in the civil and common law literature.

It goes without saying that the potentialities inherent in the law of contract and sales were lost on many courts. The force of tradition expressed in the privity dogma prevented many courts in civil and common law countries alike from allowing direct recovery in contract. And even the most daring courts were forced to observe some of the traditional limitations. The implied warranties of our sales law are restricted in scope and subject to disclaimer. Protection, furthermore, may be unavailable to the last buyer in a string of sales because the chain of purchasers did not buy on the same terms throughout. Under

31. See note 210 and accompanying text infra.
32. S. WILISTON, CONTRACTS § 998 (3d ed. 1964); Judgment of Feb. 25, 1915, 87 RGZ 1, 2, discussed in text at note 150 infra.
35. See 2 AMERICAN LAW OF PROPERTY § 9 (A.J. Casner ed. 1952); 1 R. AIGLER, A.F. SMITH & S. TEFFT, CASES ON PROPERTY 744-49 (1960). The implied warranty of title of the seller of the chattel is, in contrast to civil law tradition, not treated as negotiable under our law. Boyd v. Whitemfield, 19 Ark. 447 (1858); Smith v. Williams, 117 Ga. 782, 45 S.E. 394 (1904).
36. Stoljar, supra note 7, at 314; KESSLER, DIE FÄHRLÄSSIGKEIT, supra note 2, at 112 (1929).
39. Stoljar, supra note 7, at 309.
the German law, to give a further illustration of the precarious position of the buyer, an injured buyer is without a damage remedy under sales law if the immediate seller was not guilty of negligent performance.\textsuperscript{40}

\textit{Tort.} Small wonder that the courts everywhere resorted to tort law to free recovery from the intricacies of the law of sales. All progressive systems of law have found acceptable the notion that a person’s conduct may at once constitute nonperformance of a contractual duty and the creation of an unreasonable risk of harm to others than those in privity.\textsuperscript{41} But many legal systems have been unable to break with the classic prerequisite of tort law, the minimum requirement of negligence.\textsuperscript{42} To be sure, the consumer’s protection under tort law has been expanded in many systems by an inference or presumption of negligence in the form of a res ipsa loquitur doctrine or otherwise.\textsuperscript{43} But many a consumer has suffered defeat because he could not sustain the burden of proving negligence, or because of an affirmative showing of proper care on the part of the manufacturer.\textsuperscript{44}

To overcome these shortcomings of tort law (supposed or real), legal systems such as our own have moved in the direction of strict liability. Other legal systems which have found such a step too drastic have been put under increasing pressure to stretch conventional notions of contract law whenever possible, or even to invent new modes of liability.

The Technical Solutions in Detail

\textit{The American Case Law}

American case law, particularly during the last decade, has been truly ingenious in giving the consumer or user recovery for injuries caused by defective goods. The dramatic story of this development, mostly in

\textsuperscript{40} BGB §§ 459, 462; Kessler, \textit{The Protection of the Consumer}, \textit{supra} note 13, at 275-76.


\textsuperscript{42} This is true not only for the German, but also for the English law. Donoghue v. Stevenson, [1932] A.C. 562, 622.

\textsuperscript{43} Prosser, \textit{supra} note 11, at 1114-15. For the English law, see, e.g., Grant v. Australian Knitting Mills Ltd., [1996] A.C. 85; Mason v. Williams, Ltd., [1935] 1 All E.R. 808, 810. Under German law the manufacturer has the burden of proof with regard to careful selection and supervision of his employees. The German counterpart to res ipsa loquitur is the \textit{Beweis des ersten Anscheins}. See generally O. Palandt, \textit{Bürgerliches Gesetzbuch} Vorben. 6 vor § 249, § 823 Bem. 13 (22d ed. 1963). As to its usefulness, see text after note 139 \textit{infra}.

\textsuperscript{44} This is particularly true for the German law. 2 H. Soergel—W. Siebert, \textit{Bürgerliches Gesetzbuch} § 823 Bem. 498 (9th ed. 1962). For our law see the observations of Traynor, J., concurring in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 456, 460-44 (1944). See also Jaffe, \textit{Res Ipsa Loquitur Vindicated}, 1 \textit{Buffalo L. Rev.} 1, 12, 13 (1951).
the law of torts, has often been told in recent years. Therefore, only the high points of the evolution of our law will be recapitulated so as to permit a comparison with other legal systems.

Negligence Liability. The rapid pace in the recent evolution of our law toward strict enterprise liability is all the more remarkable when we consider the quietist attitude taken by most common law courts for three-quarters of a century, following the "landmark" decision in Winterbottom v. Wright. The reasoning and philosophy of the case, which took the fault principle for granted, expressed strong sentiments of public policy. It was therefore broadly interpreted. Not only did it lend strength to the principle that "facts which constitute a contract cannot have any other legal effect," but for a long time it was also misunderstood to mean that the manufacturer or seller is not liable to a remote purchaser or user for harm caused "even by lack of care on his part in putting out the product."

However powerful the inclination "to throw a strong arm of protection around the manufacturer warding off claims of third parties not direct purchasers," a counter-current reflecting profound changes in social policy was inevitable. Tort liability appeared rather early (at least in this country) in situations where the injury was caused by chattels "inherently dangerous to life or health" (such as poisons, explosives and deadly weapons); it was daringly extended to cover all negligently made products. Protection under a broad rule came to be accorded to those not in privity "who will foreseeably use or be exposed to the use of such products and will probably be hurt by them if they are negligently constructed, handled or repaired." This development was
accompanying and reinforced by a constant extension of duties to use reasonable care and skill in the adoption of a safe plan or design,\textsuperscript{2} and of duties to test, to warn and to give directions to prevent unsafe use.\textsuperscript{2}

After some hesitation liability for negligence was broadened to cover property damage,\textsuperscript{5} but direct liability for mere economic loss is still unsettled.\textsuperscript{5}

The philosophy underlying this extension of negligence liability was forcefully expressed by Mr. Justice Jackson in his dissenting opinion in \textit{Dalehite v. United States}:

\ldots This is a day of synthetic living, when to an ever increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try our drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is neces-

\begin{itemize}
\item Beadles v. Servel Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951) (protection of secondhand buyer).
\item 52. \textit{RESTATEMENT (SECOND) OF TORTS} § 398 (1965). The manufacturer of a cosmetic or drug must keep abreast of medical knowledge. \textit{E.g.}, Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958). There is a duty to recall goods which turn out to be defective after sale, see Comstock v. General Motors Corp., 356 Mich. 163, 99 N.W.2d 627 (1959), and even a tendency to impose a continuing duty to provide safety devices developed after the sale. Noel v. United Aircraft Corp., 342 F.2d 292 (3d Cir. 1963) (alternative holding). \textit{But see} Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 508, 135 N.E.2d 231, 238 (1956) (no duty to "adopt every new device which might possibly have been conceived or invented"). Where the defect is known or obvious, the user, we are frequently told, is not in need of protection. Campo v. Scolfield, 301 N.Y. 468, 55 N.E.2d 892 (1950). \textit{But see} Wagner v. Lansen, 136 N.W.2d 312 (Iowa 1962); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); F. Harper & F. James, \textit{Torts} § 285 (1956). For the difficulties encountered in the development of the negligent design concept, see Katz, \textit{Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars}, 69 HARV. L. REV. 863 (1956); O'Connell, \textit{Taming the Automobile}, 58 Nw. L. Rev. 293, 370 (1963). For the English law, see H. Street, \textit{Torts} 172 (3d ed. 1962).
\item 54. \textit{E.g.}, C.D. Herne, Inc. v. R.C. Tway Co., 294 S.W.2d 594 (Ky. 1956).
\item For a careful analysis of the "types of harm" which are recoverable in an action based on negligence, see Franklin, \textit{supra} note 11, at 980-86.
\end{itemize}
sary to determine the presence or the degree of danger, the product
must not be tried out on the public, nor must the public be ex-
pected to possess the facilities or the technical knowledge to learn
for itself of inherent but latent dangers. The claim that a hazard
was not foreseen is not available to one who did not use foresight
appropriate to his enterprise. 346 U.S. 15, 51-52 (1953).

A parallel process of widening the producer’s liability to persons not
in privity took place in warranty law, profoundly affecting the scope
and meaning of express as well as implied warranties.

Strict Liability. The relentless erosion of classical tenets made
a further transformation of products liability almost inevitable.
Frequently backed by the powerful argument that each enterprise should
pay its own way, strict (enterprise) liability has begun to exercise
strong appeal. Indeed, to many a court its adoption and the attendant
removal of both privity and negligence seemed but a culmination of
tendencies within sales and tort law clamoring for open recognition
and synthesis. Warranty liability, no longer confined to sales trans-
actions, made its contribution to the process of merger by reminding

56. On express warranties see note 21 supra. Extended protection of persons not in
privity by implied warranties began with, but could not be confined to, food cases. E.g.,
Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Ryan v. Progressive
Grocery Stores, Inc. 255 N.Y. 388, 175 N.E. 105 (1931); Continental Copper & Steel Indus,
Inc. v. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. App. 1958) (commercial loss); Spence
v. Three Rivers Bldrs. & Masonary Supply, Inc., 333 Mich. 120, 90 N.W.2d 873 (1958);
removed). Since warranty liability is strict liability, the removal of privity paved the
way for strict liability to the consumer or user.

57. On the inevitability of the process, see Prosser on Torts, supra note 6, at 672-73.
Sometimes the imposition of strict liability was no more than a dictum. E.g., Greenman
language of strict liability used in many cases should not obscure the fact that typically
the defect is caused by somebody’s fault; there was either a faulty design, or the manu-
facturing process was not up to required standards of care. Strict liability, therefore,
is frequently vicarious liability of the manufacturer to whose plant the defect can be
traced. The frequent “confusion” of warranty and negligence concepts is, therefore,
not surprising. Comment, Cigarettes and Vaccine: Unforseeable Risks in Manufacturers’

58. See note 240 and accompanying text infra.

59. The much discussed case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358,
161 A.2d 69 (1960), constitutes the turning point; its significance has justly been com-
pared with Cardozo’s famous opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382,
111 N.E. 1050 (1916), expounding negligence liability. See Prosser, The Fall of the Citadel
(Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 792 (1966). This article also gives
a list of the jurisdictions following the Henningsen rule. Id. at 793-99.

60. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring
opinion), discussed in text at note 240 infra.

61. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 454, 446-56, 212 A.2d
769, 775-81 (1965) (continuing implied warranty of fitness imposed on lessor of truck to
protect employees of lessee); accord, Delaney v. Townmotor Corp., 339 Pa. 14 (2d Cir.
1964); 2 F. Harper & F. James, Torts § 28.19 (1956); Farnsworth, Implied Warranties of
Quality in Non-Sales Cases, 57 Colum. L. Rev. 653 (1957). For an interesting attempt to
work out the “transactional” limitations of warranty liability, see Gagne v. Bertram,
courts that sellers of defective goods are, on principle, strictly accountable for injuries to remote parties anyhow, if only by indirection. In tort law itself, despite the victory of the fault principle during the nineteenth century, pockets of strict liability have continued to survive or were revived, such as liability for ultrahazardous activities, vicarious liability and responsibility for unwholesome food—areas all capable of expansion. Even in parts of the law dominated by the negligence requirement, strict liability was approached, if not achieved, by a constant tightening of the standards of care and by a liberal, if not over-generous application of res ipsa loquitur. Finally, to give the


63. The analogy between ultrahazardous activities and the manufacture of defective goods, e.g., 2 RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1955), is by no means compelling. Noel, Strict Liability of Manufacturers, 50 A.B.A.J. 446, 448 (1964).

64. James, An Evaluation of the Fault Concept, 32 Tenn. L. Rev. 393, 395 (1965). The increasing tendency to hold the assembler liable for the negligence of his supplier is discussed in 2 F. Harper & F. James, SHORTER TREATISES ON THE LAW OF TORTS § 2.28 (1956); see 2 RESTATEMENT (SECOND) OF TORTS § 400 (1965).

65. In response to widespread public sentiment, strict liability appeared rather early in food and drink cases where case law, in the name of public policy, accorded protection to the consumer not in privity either by reviving the ancient warranty of wholesomeness or by tightening the duty of care imposed on the seller of food. Parks v. C.C. Yest Pie Co., 93 Kan. 354, 144 P. 202 (1914) (manufacturer or dealer “practically must know if it is fit or take the consequences if it proves destructive”); Greenberg v. Lorenz, 9 N.Y.2d 195, 195 N.E.2d 773, 213 N.Y.S.2d 39 (1961); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 603, 195 S.W.2d 328 (1914); Mazetti v. Armour & Co., 150 Wash. 632, 153 P. 633 (1915) (commercial loss, warranty); see Brier v. Rath Packing Co., 221 Md. 103, 156 A.2d 442 (1959).


67. E.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 426 (1944); Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959) (plaintiff not required to exclude every possible cause for injury other than that of negligence). It has often been emphasized that strict liability does not go much beyond negligence aided by res ipsa loquitur in the action, and the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not.” Prosser, supra note 11, at 1114.

There is a substantial body of case law in which negligence was inferred from creditable evidence of a defect. Keeton, Recent Decisions, supra note 66, at 623-27, 634. See also Jaeger, How Strict is Manufacturer’s Liability? Recent Developments, 40 Minn. L. Rev. 299, 294-95 (1965); Keeton, Products Liability—Proof of the Manufacturer’s Negligence, 49
injured party the best of all possible worlds, the tort character of responsibility for quality was often emphasized, encouraged by the happy circumstance that warranty liability had never lost its tort character altogether.\(^6\) In this fashion, aspects of warranty liability, such as privity, disclaimer clauses, and the prerequisites of reliance and notice were bypassed whenever they were regarded as obnoxious or unfair.\(^6\) (This development in turn has encouraged, if not forced, modern sales law to modernize its pertinent provisions and to make them more flexible.)\(^7\) The emergent new type of liability thus benefited from the contribution of both branches of law.

The advent of strict liability was accompanied by a constant broadening of the concept of defective product. It came to include not only goods whose defects are caused by a miscarriage of the manufacturing process (the traditional defective product), but products which are unreasonably dangerous because of their design or composition.\(^7\) Furthermore, a product not inherently defective will be treated as defective if its use has caused harm because of improper directions or

\(^{68}\) PROSSER ON TORTS, supra note 6, at 651. Warranties grew out of the action of deceit, the use of which until Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 460 (K.B. 1789), "was limited to cases of direct transactions between the parties. . . ." With the Pasley case it came to be recognized that deceit was "not necessarily founded upon a contract." PROSSER ON TORTS at 699. The old action of deceit thus was one of the most striking instances of the early recognition of culpa in contrahendo in the common law. On culpa in contrahendo, see Kessler & Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964).


\(^{71}\) The distinction is still preserved in Restatement (Second) of Torts (1965) (compare § 398 with § 402A), apparently to accommodate the courts which are not prepared to go all the way. Since the latter section goes beyond the former and covers both classes of cases, a court adopting the broad principles of strict liability laid down in § 402A will have to impose strict liability to the user of a chattel "made under a plan or design which makes it dangerous." Id. at § 398.

It is not always possible to say whether we are dealing with a faulty design or miscarriage of manufacturing situation. E.g., Putman v. Erie City Mfg. Co., 336 P.2d 911 (5th Cir. 1959); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
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inadequate warning.\textsuperscript{72} Even unforeseeability of harm, given the state of available knowledge, has, occasionally, not afforded an excuse from liability.\textsuperscript{73} And assemblers have not been excused simply because they bought from otherwise reliable suppliers and were not negligent in inspecting.\textsuperscript{74} Strict liability is therefore far more than negligence liability in disguise.\textsuperscript{75}

Second thoughts are occasionally voiced about the nature, outer limits and social desirability of products liability. Not only has the fault principle found new and thoughtful defenders,\textsuperscript{76} but even when strict liability has been accepted as basically sound, many searching questions have been raised which have not all received satisfactory answers. Since these questions deal with issues which go to the very heart of products liability, their treatment in detail will have to wait for discussion of the policy bases of strict liability.\textsuperscript{77} But the issues raised must be briefly summarized here, as they provide the framework within which the future development of products liability will take place.

Time and again, these questions have been asked: How strict is strict liability?\textsuperscript{78} Should the economic feasibility of improving a product constitute the outer limit of liability?\textsuperscript{79} Cases involving new drugs and tobacco products, in particular, have raised the problem whether the manufacturer should have to pay when at the time of marketing


\textsuperscript{73} Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); see note 258 infra.


\textsuperscript{77} See text at note 240 infra.


\textsuperscript{79} Gossett v. Chrysler Corp., 359 F.2d 84 (6th Cir. 1965).
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“no developed human skill and foresight” could insure safety. The steady rise in allergy litigation has dramatized the issue to what extent the manufacturer should be able to protect himself by adequate warning. The availability of insurance (products liability, workmen’s compensation, accident insurance) has altered theories of enterprise liability. The emergence of strict liability has invited courts and scholars to develop a workable theory for determining the party best able to gather and distribute risk. Recent case law has shown the need for giving more precise meaning to the standard answer that liability should be placed on the dominant party. Finally, questions have been raised as to the desirability of a distinction between physical and mere intangible (commercial) harm, and as to the availability of disclaimers. Small wonder that the suitability of case law to cope with these issues has been put in question.

Further complications have been added by the Restatement (Second)

80. This formula has repeatedly been used in tobacco cases. E.g., Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962). For representative tobacco cases, see, in addition to the Green case, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (liability predicated on foreseeability of harmfulness, based on state of human knowledge); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (merchantability). For the subsequent history of the case, see Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965).


81. Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 3d 340, 29 Cal. Rptr. 322 (1963) (negligent disregarding of warning by physician is unforeseeable by manufacturer who is, therefore, exempted from liability). For a collection and discussion of allergy cases, see id. at 353, 29 Cal. Rptr. at 329.


85. See text accompanying notes 121-32 infra.

86. See text accompanying notes 268-84 infra.

87. Smyser, supra note 76, at 351-52; Plant, supra note 76.
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of Torts and the Uniform Commercial Code. Both deal with products liability, and their provisions overlap. The warranties of quality enumerated in the Code are broad enough to allow recovery for defects which make a product "unreasonably dangerous" to the person or property of the consumer or user—the criterion used by the Restatement of Torts. A product which does not measure up to the quality "contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to its characteristics" is unmerchantable. The Code protects the buyer of a defective product not only against commercial injury but also against injuries to his person or property "proximately resulting from the breach of a warranty." It is thus not possible to divide the jurisdictions of Restatement and Code by assigning consumer protection against physical injury to the former while leaving the task of protecting the commercial buyer and his purely economic losses to the latter. Nor is it the function of the Uniform Commercial Code simply to protect a buyer in privity by warranty law, or of the Restatement simply to protect remote parties against physical injuries. The Restatement rule applies

88. U.C.C. §§ 2-313 to -315. It will not do to disregard the U.C.C., as the Illinois Supreme Court has done in Swada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

89. § 402A SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER
1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

90. Restatement (Second) of Torts, § 402A, comment i at 352 (1965).

91. In the language of a most recent case, "it may fairly be said that the liability which [Restatement, section 402A] would impose is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties." Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).


92. U.C.C. §§ 2-714(5), 715(2)(b). For a possible conflict between recovery under the Restatement and the U.C.C., see Franklin, supra note 11, at 999, 1000.

93. See note 127 and accompanying text infra.
to immediate as well as remote parties, and the Code protects "any natural person who is in the family or household of [the] buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by a breach of the warranty." The Code, we are told, is neutral with regard to remote parties who do not fall into this category, and a comment makes quite clear that section 2-318 is not intended either to enlarge or to restrict the developing case law on how far an original seller's warranty extends. But although the Code and the Restatement may agree in the desirability of according protection to remote parties, the drafters of the Code clearly contemplate extensive use of warranty doctrine, whereas the Restatement has radically broken with notions of warranty.

Does it make any difference whether tort or warranty theory is used? The two approaches do diverge in two respects: the requirement of

94. Restatement (Second) of Torts § 402A, comment I at 354 (1965).
95. U.C.C. § 2-318. (This section has been made optional. See note 96 infra.)
In this respect section 43 of the Uniform Revised Sales Act (Proposed Final Draft No. 1, 1944) and the 1949 version of section 2-318 were even bolder: they protected remote vendees. Furthermore, section 2-718 provided for interpleader of the seller by his buyer, who is in an intermediate position in the chain of distribution, and section 2-719 gave a "direct action against the seller or any person subject to interpleader." See generally Weaver, Allocation of Risk in Products Liability Cases: The Need for a Revised Third-Party-Beneficiary Theory in UCC Warranty Actions, 52 Va. L. Rev. 1028 (1966).
96. U.C.C. § 2-318, Comment 3. To meet increasing criticism, the Permanent Editorial Board for the Uniform Commercial Code in its Report No. 3 (1967) has made section 2-318 an optional alternative (Alternative A) giving two other alternatives. Section 2-318, the Report says, is not "a section requiring uniformity throughout the United States" (Report at x) and it adds: "There appears to be no national consensus as to the scope of warranty protection which is proper, but the promulgation of alternatives may prevent further proliferation of separate variations in state after state." Id. at 14. Alternative B returns to the 1950 version of the Code and provides as follows: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Id. at 15. Alternative C is even more daring. It is "drawn to reflect the trend of more recent decisions as indicated by Restatement of Torts 2d Section 402A extending the rule beyond personal injuries." Id. at 14. It reads as follows: "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends." Id. at 15.
Two examples of state rejection of the original statement of section 2-318 may be given. Virginia in 1962 substituted for section 2-318 an anti-privity statute, which, without eliminating the notice and disclaimer provision, goes beyond section 2-318 and accords warranty protection to an injured person, although he "did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods ...." Va. Code Ann. § 8-561.3 (Supp. 1964), discussed in Emroch, Statutory Elimination of Privity Requirements in Product Liability Cases, 43 Va. L. Rev. 998 (1957), and Speidel, supra note 78. California, by contrast, has adopted the tort approach to products liability by eliminating section 2-318 altogether since it represents "a step backwards" when compared with the case law imposing strict liability in tort without contract or negligence. Report of California State Bar Committee on Commercial Code, 57 Calif. S.B.J. 143 (1962).
notice and the availability of disclaimers.\textsuperscript{97} The Restatement dispenses with the notice requirement altogether\textsuperscript{98} while the Code requires notification of a defect or injury within a reasonable time.\textsuperscript{99} But on close scrutiny, they are not too far apart. And where they cannot be reconciled, the Code, it is submitted, is more satisfactory.

The Code, probably inspired by progressive case law,\textsuperscript{100} differentiates between a merchant buyer and a retail (lay) consumer. For the former, the time allowed for notification "after the defect was or should have been discovered" is to be determined by commercial standards. For the latter, reasonableness is to be "judged by different standards"; the time for notification is subject to extension, because "the rule of requiring notification is designed to detect commercial bad faith, not to deprive a good faith consumer of its remedy."\textsuperscript{101} Even against his immediate seller, a lay consumer will, it seems, not necessarily be deprived of his remedy if he notified only after injury rather than after acceptance.\textsuperscript{102} The group of third party beneficiaries singled out for protection by section 2-319 is treated with the same, if not greater, consideration. Although required to give notice of injury, they have complied with their good faith duty by notifying "once they have become aware of their legal consideration."\textsuperscript{103} Injured consumers are not likely to consider notifying manufacturers until they have had legal advice.\textsuperscript{104}

The Restatement goes too far; it dispenses with a notice requirement altogether and permits recovery until the statute of limitations has barred the claim. Certainly, the immediate buyer and the persons pro-

\textsuperscript{97} Since the injured person will have at his disposal the implied warranty of merchantability (U.C.C. § 2-314), he will not have to worry about the requirement of reliance upon the representation, skill or judgment of the seller which qualifies liability for the implied warranty of fitness for a particular purpose. U.C.C. § 2-315. Nor does he have to worry about privity in cases where he relies on an express warranty. See U.C.C. § 2-313, Comment 2. There is a further discrepancy worth mentioning: protection of a buyer against physical injury under the U.C.C. presupposes that the injury proximately resulted from the breach of warranty. § 2-715(2)(b). A buyer then who uses goods without discovery of a defect is not entitled to consequential damages if a reasonable inspection would have disclosed the defect. U.C.C. § 2-715, Comment 5. Under the Restatement rule the buyer is not precluded even if guilty of contributory negligence so long as he not voluntarily assumed the risk, i.e., actually discovered the defect and aware of the danger unreasonably proceeded to use the goods. \textit{Restatement (Second) of Torts} § 402A, comment n (1965); see Speidel, \textit{supra} note 78, at 831-34.

\textsuperscript{98} \textit{Restatement (Second) of Torts} § 402A comment m (1965).

\textsuperscript{99} U.C.C. § 2-607(3).

\textsuperscript{100} For a collection of the case law, see Prosser, \textit{The Assault Upon the Citadel}, \textit{supra} note 11, at 1130-31.

\textsuperscript{101} U.C.C. § 2-607, Comment 4.

\textsuperscript{102} Id., Comment 5.

\textsuperscript{103} Id.

\textsuperscript{104} Id.
ected by section 2-318 do not deserve such protection. And the manufacturer is vitally interested in being notified of a defect so he can correct the manufacturing process or recall similarly defective goods.105

The Restatement in the name of public policy has also done away with disclaimers.

The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hand.106

The Uniform Commercial Code, by contrast, has attempted to strike a balance between freedom of contract and social control, so as to leave room for legitimate bargaining about the allocation of risks due to product defects. The guidelines set up, however, are unduly complicated and vague. They distinguish between exclusion and modification of warranties on the one hand, and modification or limitation of remedies for their breach on the other.107 By setting up different rules for the two types of disclaimer, the Code gives the impression that its draftsmen could not make up their minds on policy. Section 2-316 of the Uniform Commercial Code shows a clear tendency in favor of freedom to disclaim. Implied warranties may be excluded altogether. But there is also an attempt to police disclaimers by requiring that they be couched in language giving the buyer fair warning of the risks he assumes.108

Consumer protection is further strengthened by the provision that an unconscionable limitation or modification of consequential damages is not enforceable and that limitation "of consequential damages for

105. Franklin, supra note 11, at 1000.
108. U.C.C. § 2-316(3).

Were the validity of the warranty disclaimer involved in Henningsen to be evaluated under the U.C.C., then section 2-719 would be controlling. The exclusion of a personal injury claim would be prima facie unconscionable, and, the car not being an experimental racing car, clearly understood to be driven at the owner's risk, prima facie unconscionability would not be subject to rebuttal. Damage to the car would be governed by U.C.C. sections 2-719(1), -719(2): since the car was totally destroyed, the limited remedy would fail of its essential purpose; the contractual modification of remedy would be unavailable. See Rose v. Chrysler Motors Corp., 212 Cal. App. 2d 765, 28 Cal. Rptr. 185 (1963). There would be no need, therefore, to invoke the general unconscionability provisions of section 2-302. The availability and general use of collision insurance should not affect the validity of the disclaimer. The insurance company should be subrogated to the claims of the policyholder.
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injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not.109 This explicit control of unconscionable bargains is not repeated expressis verbis in the Code section permitting the exclusion or modification of (implied) warranties. The omission may lead a reader to assume that a warranty disclaimer which follows the statutory language prescribed is above reproach and cannot be attacked under the general provisions of the Code proscribing unconscionable clauses (section 2-302) or imposing an obligation of good faith performance (section 1-203).110 Such interpretation would be most unfortunate, particularly since the Code's specification of the language of disclaimers is inadequate. A seller, for instance, is permitted to exclude the all-important warranty of merchantability by using in his disclaimer the word "merchantability," provided, in the case of a writing, that he does so in a conspicuous fashion.111 This may trap an ordinary consumer. It may be too much to hope that sellers will not make the most of the opportunity.112 Courts should, therefore, in an appropriate case be allowed to read the general unconscionability and good faith provisions into section 2-316 and to resort to section 2-316(1) which protects the buyer from "unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty."113 The arsenal of weapons thus available will bring the law of the Code and the Restatement closer together. This is all the more important in view of the (widespread?) practice of enlarging the

109. U.C.C. § 2-719(3).
111. U.C.C. § 2-316(2) to -(3).
112. Complete disclaimer clauses seem, however, to be rare. Note, Unconscionable Contracts Under the Uniform Commercial Code, 109 U. PA. L. Rev. 401, 408 (1961); Franklin, supra note 11, at 1012.
Automobile manufacturers have, however, attempted to keep complete control over their repair and replacement duties, which purport to be the buyers' sole remedy, by making these duties conditional on the manufacturer being satisfied that a defect exists. For the protection of the buyer against an "uncontrolled" decision on the manufacturer's part, see Cannon v. Pulliam Motor Co., 230 S.C. 131, 94 S.E.2d 397 (1956).
113. U.C.C. §§ 1-203, 2-302, 2-313, 2-316, Comment 1. Unfortunately, Comment 1 to section 2-302 declares that the "principle [laid down in the section] is one of prevention of suppression and unfair surprise, and not of disturbance of allocation of risks because of superior bargaining power." Under this interpretation a uniform but conspicuous standard disclaimer clause would be valid. It seems preferable "to read U.C.C. section 2-719 into the general unconscionability section." Franklin, supra note 11, at 1017. According to U.C.C. sections 2-313(l)(b), any description of the goods, which is made part of the bargain creates an express warranty that the goods shall conform to the description. See also Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L.J. 199, 219, 282-83 (1965).
group affected by disclaimers, by printing them in retail sales agreements or on labels.\textsuperscript{114}

It would be unfair to criticize the draftsmen of the Code and the Restatement for not having joined forces to work out a single theory of products liability. The Restatement reflects the dramatic changes in case law which took place after the rules of the Uniform Commercial Code had become frozen.\textsuperscript{115} It is to the credit of the draftsmen of the Code that they had the vision to foresee this possibility and to keep the system of warranty law open. The accomplishments of much recent case law, as crystalized in the Restatement, can be read into the Uniform Commercial Code; the tension between Code and Restatement in physical injury situations can therefore be narrowed if not overcome. Still, it is desirable to clarify the relationship between Code and Restatement. In this connection, attention should be paid to the most recent cases concerned with the outer limits of the tort approach to products liability. In dealing with this problem, a differentiation between physical injury and commercial losses, between consumer and mercantile sales has, on occasion, been advanced. Since this paper deals with the physical injury aspect of products liability, no attempt will be made to discuss these questions in detail. Only briefly will they be referred to so as to round out the picture.\textsuperscript{116}

Protection of economic interests is not as fully advanced in our law as is the security of persons and of tangible property. The reluctance of many courts to allow recovery for negligent causing of economic harm may serve as illustration.\textsuperscript{117} This does not mean, however, that economic interests have remained unprotected, it only implies that negligence law, as a rule, is unavailable as an avenue for recovery against a remote party.\textsuperscript{118} The injured consumer still has at his disposal the avenues of


A disclaimer between manufacturer and middleman, however, is not binding on a consumer, especially if the latter is unaware of it. Franklin, supra note 11, at 1015; Keeton, supra, at 134. U.C.C. section 2-318 has taken a step in the right direction. It provides that "a seller may not exclude or limit the operation of this section."

\textsuperscript{115} But see note 95 supra.

\textsuperscript{116} They are admirably discussed in Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917 (1966).


\textsuperscript{118} "[E]conomic interests are not entitled to protection against mere negligence," Prosser on Torts, supra note 6, at 663. This is also the position taken by German law. See text at note 147 infra.
(implied) warranty, and misrepresentation (express warranty).\textsuperscript{110} But warranty liability for economic losses, it has frequently been assumed, presupposes privity, and liability for misrepresentation, justifiable reliance.\textsuperscript{120}

Understandably, the advent of strict tort liability has led to attempts to close the gap by using the newly discovered category. Since strict tort liability has caught the imagination of the courts, it proved as difficult to control as the broom in the Sorcerer’s Apprentice. But there has also been considerable resistance to letting strict liability inundate the whole field of products liability. Two recent cases are representative of the policy conflict. In Santor v. A & M Karagheusian, Incorporated, the New Jersey Supreme Court, in a unanimous decision, held the manufacturer of a defective carpet directly liable to the ultimate purchaser for loss of his bargain.\textsuperscript{121} The court saw no reason why products liability to remote purchasers should be limited to physical injuries caused by defective goods.\textsuperscript{122} In the court’s view, the manufacturer under modern marketing conditions is the “father of the transaction,” the dealer from whom plaintiff bought a mere way-station.\textsuperscript{123} To insist that the only addressee of plaintiff’s recovery should be the dealer who, in turn, could recover from the manufacturer, would be unnecessarily wasteful and frustrating, all the more since the dealer had gone out of business.\textsuperscript{124} Rationalizing direct recovery in terms of implied warranty, characterized as a hybrid of contract and tort law,\textsuperscript{125} the court permitted plaintiff to recover the difference between the price paid for the carpet marketed as grade #1 and its actual value at the
time when plaintiff knew or should reasonably have known that it was defective.126

In Seely v. White Motor Company, a majority of the California Supreme Court in a strong dictum took issue with this position.127 In the absence of an express warranty the manufacturer will not be held strictly accountable for mere economic losses. Otherwise, the court felt, the manufacturer would be responsible for damages of "unknown and unlimited scope."128 Tort liability, according to the court, was not designed to undermine the warranty provisions of the Sales Act or of the Uniform Commercial Code, but rather to govern the distinct problem of physical injuries.129 Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting.130 Replying to the opinion in the Santor case the court had this to say:131

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manu-

126. Id. at 68-69, 207 A.2d at 314.
127. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Plaintiff had bought from a dealer on the installment plan a truck manufactured by defendant, signing a purchase order in which the manufacturer had "warranted each new motor vehicle to be free of defects," but had limited its obligation by the typical repair and replacement clause. When it was discovered that the truck was subject to severe vibrations making driving difficult, the dealer with the manufacturer's guidance made many unsuccessful attempts to eliminate "galloping." Plaintiff refused to make further payments and when the dealer repossessed, brought suit in express warranty against dealer and manufacturer for the portion of the purchase price paid and for loss of profits, since he was unable to use the truck. In addition, he sought recovery (in tort) for damage to the truck suffered in an accident allegedly caused by the defect. Recovery of the down payment and loss of profits were allowed on the theory that this was a breach of an express warranty. But recovery for damage to the truck was denied since the evidence failed to establish that the accident was caused by the defect. The repair and replacement clause invoked by defendant to defeat the claim for damages was disregarded in the light of repeated failures to correct the defect as promised. Id. at 14, 403 P.2d at 148, 45 Cal. Rptr. at 20.
128. Id. at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22-23.
129. Id. at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.
130. Id. at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.
131. Id. at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. A further comment on Santor is also worth quoting. "The court [in Santor] held the manufacturer liable for the difference between the price paid for the carpet and its actual market value on the basis of strict liability in tort. We are of the opinion, however, that it was inappropriate to impose liability on that basis in the Santor case, for it would result in imposing liability without regard to what representations of quality the manufacturer made. It was only because the defendant in that case marketed the rug as Grade #1 that the court was justified in holding that the rug was defective. Had the manufacturer not so described the rug, but sold it 'as is,' or sold it disclaiming any guarantee of quality, there would have been no basis for recovery in that case. Only if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort." Id. at 17-18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Justice Peters, in his dissenting and concurring opinion, was in favor of drawing the line between tort and contract liability in terms of consumer as contrasted with commercial sales, treating the litigation in Seely as involving a consumer sale.\(^\text{132}\)

**The German Law**

In reporting on the civil law, it seems best to start with the German system. Despite valiant attempts by the courts to free the case law from the fetters of the Civil Code [BGB], German law of products liability still represents a phase in development which French and American law have left behind.\(^\text{133}\) And proposed statutory changes would pattern Dutch law after the progressive French system.\(^\text{134}\)

In Germany, consumers are faced with a fault principle to which the BGB appears to be more firmly committed than the law of many other legal systems. It dominates contract as well as tort law.\(^\text{135}\) In both areas of civil liability the recovery of damages is predicated on a showing of negligence, at least in principle. Respect for the dignity of the individual and the need of society to encourage productive activities militates, we are told, against the abolition of the fault rule.\(^\text{136}\) This

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132. Id. at 28-29, 409 P.2d at 158, 45 Cal. Rptr. at 30.
133. See authorities cited note 161 infra.
136. 1 Lorenz, *supra* note 3, § 19; Wahl, *Das Verschuldenstip*, *supra* note 9, at 17-35. But see, e.g., Gernhuber, *Haftung des Warenherstellers*, *supra* note 20; Lorenz,
attitude has serious repercussions for products liability. The aedilition remedies (rescission and price reduction), it will be remembered, are open to the buyer of defective goods even against an innocent seller. To this extent German law is willing to invoke strict liability in order to restore the disturbed equivalence between the price paid and the quality of the commodity. But, unless the seller has given an express warranty or has been guilty of fraudulent concealment, the buyer’s damage remedy is predicated on negligent performance. Tort liability, because of the negligence requirement, is also an inadequate corrective. Consumer protection, consequently, falls short of the solicitude shown in other legal systems. This is all the more remarkable since Germany like other countries has found it necessary or expedient to mitigate the fault principle by exceptions and counterrules. German law, for instance, imposes strict liability for extra-hazardous activities; it provides for vicarious liability, and it has rules changing the burden of proof concerning negligence and a doctrine akin to res ipsa loquitur (Beweis des ersten Anscheins). But these exceptions have been narrowly confined, and the potentialities inherent in the countrules have never been fully exploited.

Before going into the technical details of German law a few general remarks about these tendencies to pull away from negligence may provide perspective.

German law recognizes strict liability for harm resulting from abnormally dangerous conditions and activities. Gefährdungshaftung covers activities such as blasting and even the operation of a railroad or motor vehicle. But these and other exceptions to the fault rule have remained isolated instances and have not been generalized into a broader theory of liability for dangerous products. Case law, it is
true, has often announced in sweeping language, a duty not to let goods dangerous to health enter commerce.\textsuperscript{142} But, as we shall see, this duty has never been pushed to its full implications: strict liability.\textsuperscript{143}

The treatment of vicarious liability furnishes another striking illustration of the sway of the fault rule.\textsuperscript{144} German law makes provision for the risks inherent in the division of labor, but only half-heartedly. Different principles are applied in contract and tort situations. According to the law of contracts a debtor cannot delegate his contractual duties to another without being responsible for the latter's fault in performance.\textsuperscript{145} Proper care in selection and supervision is no excuse. Thus, though the fault principle is abolished with regard to the master, it reappears as far as the servant's performance is concerned. In tort law, the situation is reversed. Liability of an employer for harmful conduct of an employee is predicated on fault of the employer, either in the form of negligent supervision or negligent selection.\textsuperscript{146} As far as an employee is concerned he need not be at fault. It is enough that he commits a wrongful act, that is, that his activities have caused injury to person or property; a mere pecuniary loss is insufficient.\textsuperscript{147} The burden of exculpation is placed on the employer,\textsuperscript{148} who must show proper care in supervision and selection, just as the seller in a damage suit for injuries caused by a defective product must establish that his servant was not negligent in performance.\textsuperscript{149}

So much by way of introduction. It is time now to turn from the outline of general principles to concrete problems.

One of the most fascinating cases in the field is an old decision of the Reichsgericht, the so-called \textit{Brunnensalz Fall} (synthetic mineral salt

\textsuperscript{142} E.g., Judgment of Jan. 17, 1940, 163 RGZ 21, 25-26; accord, Judgment of June 23, 1952, [1952] VERSR 357 (Bundesgerichtshof); for a collection of authorities, see Adolf, \textit{supra} note 21, at 95 n.2; H. Stoll, \textit{Das Handeln auf eigene Gefahr} 337 (1961).

\textsuperscript{143} See text at note 162 infra.

\textsuperscript{144} For a comparative treatment, see generally, Neuner, \textit{Respondeat Superior in the Light of Comparative Law}, 4 LA. L. REV. 1 (1941) (advancing the thesis that, on closer analysis, the cleavage between the German and other legal systems is not as sharp as is often assumed).

\textsuperscript{145} BGB § 278; Müller, \textit{supra} note 135, at 290.

\textsuperscript{146} BGB § 831.

\textsuperscript{147} See Judgment of March 20, 1919, 55 RGZ 173.

\textsuperscript{148} 2 \textit{SOORGEL-SIBERT}, \textit{supra} note 44, § 831, Bem. 78.

\textsuperscript{149} Judgment of Oct. 23, 1958, 23 BGHZ 252; Judgment of Feb. 11, 1957, 23 BGHZ 268; Judgment of Dec. 16, 1952, 8 BGHZ 299; Judgment of June 15, 1935, 148 RGZ 148. This is in keeping with what appears to be now the prevailing view: a debtor, when sued for breach of contract, has the burden of exculpation. BGB § 282; see A. Blumeyer, \textit{Schulderrecht} § 30 III (3rd ed. 1964); 1 Larenz, \textit{supra} note 3, § 23 I b; Raapc, \textit{Die Beweislast bei positiver Vertragsverletzung}, 147 ACP 217 (1941). This rule appears also to be applicable to the sale of defective merchandise. Judgment of Feb. 13, 1908, 63 SeuffArch 357 (Reichsgericht) (bottle of mineral water sold by purveyor of food and drink contained acid); Gernhuber, \textit{Haftung des Warenherstellers}, \textit{supra} note 20.
case). It is all the more remarkable since it contains the germs for an imaginative reformation of traditional doctrine. Plaintiff, who had been prescribed the medicine by her physician, bought it in a pharmacy in the original package. When she took it, she suffered internal injuries caused by finely ground splinters of glass contained in the salt. Suit was brought against the manufacturer on two counts: in addition to a tort count asserting liability of the defendant for negligence in the manufacturing process, plaintiff based her damage claim on a contract of guarantee running directly from the manufacturer to her, and, in the alternative, on an implied assignment by the pharmacist of his warranty claim against the manufacturer. The Reichsgericht, in dealing with the contract count, did not find the privity obstacle insurmountable. But, as the court held, the factual basis for finding the required intention to warrant the purity of the product was lacking. The fact that it was distributed in the original package was insufficient to allow such an inference. To imply an intention to assign the warranty claim would be even more unnatural and far-fetched. The court added, however, that in an appropriate case an express warranty might be found in the wording of a label or otherwise. With regard to the tort count, plaintiff was more successful. The Reichsgericht reversed and remanded, emphasizing that since the plaintiff had established that the cause of the injury occurred in the defendant’s plant, he did not have to prove how the glass splinters came to be in the bottle. The defendant had the full burden of establishing his lack of negligence. To do that, he had either to identify the employee responsible for the defective product and establish proper care in his selection and supervision, or, if he could not identify the employee, to establish that he had discharged his duties with regard to every worker who might be responsible for the defective product. In the language of the opinion, only a well-supervised personnel is well-selected.

In evaluating the decision, it must be projected against its background: German sales, contract and tort law. The injured plaintiff could not have obtained compensation for her injury from her immediate seller, the pharmacist. The latter was only under duty to refund the purchase price. As selling the medicine in the original package was not blameworthy, no claim for damages was available against

151. Id. at 2.
152. Id. at 3-4.
153. BGB §§ 459, 462.
him. Also, plaintiff could not contend that the pharmacist was vicariously liable for the negligent act of his supplier. Of course, the manufacturer had broken his sales contract with the pharmacist, but since the manufacturer was not performing the pharmacist’s contract with plaintiff, the rules imposing strict liability on a debtor for faulty delegated performance did not apply.\(^\text{154}\) (Even had the pharmacist ordered the medicine from the manufacturer on plaintiff’s request, the result would have been the same under German law, unless the medicine was directly delivered by the manufacturer to the plaintiff.)\(^\text{155}\) Nor could the injured plaintiff sue the manufacturer on the basis of a sales contract; none existed. Finally, a Reichsgericht obsessed with the subjective theory of contracts was even unwilling to find a direct contract warranting the purity of the product retailed in the original package. Its attitude was more daring with regard to the availability of tort law.

The privity doctrine has remained strong enough since the mineral salt case to put serious roadblocks in the path of contractual recovery by a consumer or user against a remote manufacturer. A timid handling of vicarious liability, a conservative approach to the measure of damages, a reluctance to find the necessary intention for a direct contract of guarantee, all combined to impede, if not prevent, the expansion of contractual liability.

**Tort law.** Subsequent case law has elaborated the tort themes which appear in the synthetic mineral salt case.\(^\text{156}\) The courts have felt that traditional interpretations of the BGB gave an undue advantage to big and even medium sized industry over small enterprises. The former all too often escape liability for their defective products because they are able to point to the elaborate organization, care in selection of management and supervisory personnel, elaborate employee training programs and the practice of having new products tested by independent institutes and laboratories.\(^\text{157}\) To remedy this situation, the courts seized upon a provision which makes a corporation unconditionally liable for the tort “of its constitutionally appointed representatives.”\(^\text{158}\) Of equal or greater importance was the imposition of a general duty

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156. Judgment of Feb. 25, 1915, 87 RGZ 1, discussed in text at note 150 supra.
157. H. Weigert, Die Auservertragliche Haftung von Großunternehmen für Ange- stellte 5-6 (1925); Müller, supra note 135, at 288-92. The concept of employee (Verrichtungsgehilfe) is rather narrow. It does not cover an independent contractor. A seller who is unable to control and supervise the production of a supplier or the testing of a new drug or cosmetic by a scientific institute is not vicariously liable for the latter’s mistake, unless he was careless in his selection. Müller, supra note 135, at 289-90.
158. BGB § 81.
to develop an organization with standards of supervision and control capable of preventing potentially dangerous situations.\textsuperscript{169}

Still, the courts have not abolished altogether the statutory requirement of negligence. Case law still distinguishes between defects resulting from faulty construction and design and those resulting from a miscarriage of the manufacturing process affecting only an individual item. The former are treated, so to speak, as representing negligence per se;\textsuperscript{169} they reflect a faulty organization. The latter are still subject to exculpation.\textsuperscript{161}

A fairly recent decision of the Bundesgerichtshof dramatically illustrates the predicament of the consumer.\textsuperscript{162} The buyer of a bicycle carrying the brand name of the defendant manufacturer had suffered injury because of the collapse of the handle bar. His tort suit was unsuccessful. The trial court had found that the defect was not due to faulty construction affecting the entire series of bicycles. The defect was due rather to the fault of an otherwise competent worker. In denying recovery the court emphasized that modern mass production makes the defectiveness of individual products unavoidable. These defects, said the court, can neither be fully eliminated, nor discovered by inspection, however careful the system of production or checking.

\textit{Contract law.} Time and again efforts have been made to better the lot of the consumer by adapting contract law to the intricacies of the modern distribution process. The failure of attempts to invoke vicarious liability\textsuperscript{163} is dramatically illustrated by a decision of the Bundesgerichtshof of 1956.\textsuperscript{164} The buyer of a motorcycle with a defective steering mechanism sought recovery for his injuries from the \textit{dealer}, who had bought the vehicle ready for use from a widely-known

\textsuperscript{159} Judgment of April 3, 1940, 10 DR 1293 (1940); \textit{Smitis}, \textit{supra} note 7, at 25; 2 \textit{Soergel-Stebert}, \textit{supra} note 141, § 831, Bem. 1, 62.

This duty has been supplemented by an elaborate network of duties to give directions and warning against unsafe use. Lorenz, \textit{Länderbericht und Rechtsvergleichende Betrachtung zur Haftung des Warenherstellers}, in \textit{Die Haftung des Warenherstellers} 5, 16 (Arbeiten zur Rechtsvergleichung, Nr. 28, E. von Caemmerer ed. 1966).

\textsuperscript{160} See \textit{Judgment of Jan. 17, 1940, RGZ 21, 26.}

\textsuperscript{161} See \textit{Smitis}, \textit{supra} note 7, at 25-26, 73; Lorenz, \textit{Länderbericht}, \textit{supra} note 159, at 19-18.


\textsuperscript{163} See generally \textit{Adloff}, \textit{supra} note 21, at 48; \textit{Smitis}, \textit{supra} note 7, at 36-37; Lorenz, \textit{Rechtsvergleichendes zur Haftung des Warenherstellers, \textit{supra} note 139, at 59, 75-76; Markert, \textit{Die Schadenshaftung des Warenherstellers gegenüber dem Verbraucher}, 10 \textit{Der Betriebs-Berater} 231, 234 (1964). \textit{But see J. Esser, Schuldsrecht §§ 58(2)(c) (2d ed. 1960).}

\textsuperscript{164} Judgment of March 15, 1956, [1956] VersR 259; \textit{discussed in Lorenz, Länderbericht, \textit{supra} note 159, at 41. It is interesting that the Reichsgericht imposed strict duties of care on a grocer selling canned meat. It rejected his argument that he was under no duty to sample since his supplier had assured him of the wholesomeness of the cans. \textit{Judgment of April 19, 1918, 22 Recht Nr. 1969 (1918) (Reichsgericht).}
manufacturer. The seller's breach of contract, as plaintiff claimed, consisted in his failure carefully to inspect the vehicle before sale. The court refused to honor this argument. It held that the dealer had a "duty" only to make an external inspection and to take a ride. (Since the defect was latent, these measures did not reveal it). The court considered it too burdensome to require the dealer to take the vehicle apart. And it refused to impose vicarious liability on the dealer for the negligent acts of the manufacturer. The court may have been guided by principles of limiting liability, but it gave no policy reason in its opinion for not imposing vicarious liability; rather, it spoke only in the conclusory terms of "no duty." The holding in this case is of particular importance, since under the prevailing view it makes no difference whether the defective product was acquired before or after sale to the consumer. Since the manufacturer himself may not be liable in tort, the buyer may well be without remedy unless contract law provides other ways of reaching the manufacturer directly or indirectly.

Direct Warranty. In the synthetic mineral salt case, it will be remembered, the Reichsgericht did not regard a direct contract of guarantee running from the manufacturer to the consumer a logical impossibility. Subsequent case law has used this device of reaching the manufacturer most sparingly. It appears to have been invoked only once against the manufacturer of a defective truck and, in that case, was applied only because an express warranty was given. It would have been quite natural to imply a direct warranty of quality whenever products were sold under a trademark or a brand name. But, despite urging in the academic literature, this has not yet happened. The
decision of the Bundesgerichtshof in the bicycle case amply proves this point.

To overcome the shortcomings of tort law the domain of third party beneficiary contracts has steadily been increased, even where the injured party was clearly not entitled to demand performance of the primary duty assumed by the promisor. Differentiating between the primary duty to perform and the collateral duty to act carefully, the courts have expanded the latter duty to protect persons whose injury by defective performance was foreseeable to the promisor. But strangely enough, third party beneficiary notions have never been applied by courts of last resort in favor of a remote vendee who suffered personal injuries. Application of the doctrine has been limited to protect members of the household and employees of the original buyer or tenants for whose support buyer or tenant were legally or morally responsible.

**Loading the Measure of Damages.** Until recently, modern case law was quite promising on this score. It permitted, for instance, a promisee who had contracted for the undisclosed principal to collect for the latter’s loss, a bailee to collect for the loss of the bailor. Furthermore, a seller, who having shipped the goods was no longer responsible for the loss or damage to the goods, could bring an action against the carrier for the buyer’s damages. A fairly recent, not officially reported, decision of the Bundesgerichtshof may even have gone a step further in protecting the interest of remote parties. Plaintiff, a manufacturer of yarn, who had bought lubricating oil for the machinery that was warranted “to wash out,” was permitted to claim the damages suffered by a buyer of his yarns because oil had permanently stained the buyer’s fabric. Relying on the presumed intention of the parties, the court permitted recovery. The opinion is quite explicit in stating that plaintiff’s recovery is not predicated on his liability to his customer.

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Seckel 359 (1927); KESSLER, DIE FAHRLEICHTKEIT, supra note 2, at 112; LATTE, supra note 1, at 77; SMITH, supra note 7, at 37-48; 2 STAUDINGER, supra note 4, § 433, Bem. 97a. 170. 2 W. FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN Rechts: DAS ReCHTSGESELLSCHAFT, § 16(f)(f) (1965); G. WENZEL, VERTRÄGE ZU Gunsten Dritter 137-43 (1949); cf. GERNHUBER, Drittverbindungen im Schuldverhältnis kraft Leistungsnähe, in Festschrift für Arthur NIKUSCH 249 (1958). See the penetrating remarks of Wieacker, Das Bürgerliche Recht, supra note 1, at 16.


173. 1 LARENZ, supra note 3, § 11 III.

174. I have borrowed an expression coined by Stoljar, supra note 7, at 309.


176. Judgment of Aug. 7, 1959 (Bundesgerichtshof), referred to in 40 BGHZ 91, 105; see 2 ERMAN, supra note 141, § 249, Bem. 11e.
Products Liability

Since the claim of the plaintiff was assignable, the injured purchaser of the yarn could have acquired by assignment a cause of action against the seller of the oil, although the latter's warranty did not run to him. Under this approach the buyer of the unwholesome medicine and the buyer of the bicycle,177 would acquire a contractual claim against the manufacturer and would no longer be without remedy. This result would not be too harsh on the manufacturer because it would not increase unreasonably the measure of his liability. He should not be able to take advantage of the facts that his immediate buyer did not suffer any damages and that the person to whom he owes his primary obligation to deliver and the person who suffers damages are not identical.178

Unfortunately, this development was brought to an abrupt halt in a most recent decision of the Bundesgerichtshof, again involving a commercial loss by a third party.179 The plaintiff had used, in the manufacture of belts, poorly dyed suede leather bought from the defendant. He had sold the belts to a dress manufacturer, who in turn sold his dresses, with the belt, to a mail-order house. Since the dresses had suffered stains where the fabric had come in contact with the belts, the dress manufacturer took them back and refunded the purchase price. But he did not press any claim against plaintiff.180 Nevertheless, the trial and intermediate courts read into the sales contract an implied term which gave plaintiff the privilege to sue for the damage suffered by his customers. The Bundesgerichtshof reversed, holding that under the facts of the case no basis existed for finding such an implied term. The requisite intention on the defendant's part to be bound by such an onerous undertaking was completely lacking.181

Of late, the existing state of affairs has come under increasing attack. The draftsmen of the Code, the critics have pointed out, although representing the spirit of an age different from our own,182 did not embrace the utopian delusion of being able to tie the hands of courts by

177. Cases cited notes 150, 162 supra.
178. For a discussion of the limits of recovery, see Taegeker, supra note 8, at 48. Loading of the measure of damages (Liquidation des Drittinteresses) presupposes that the damage can only occur in the person of the third party, but not of the promisee. Müller, supra note 135, at 294-99. According to the Reichsgericht, Liquidation des Drittinteresses is only allowed if the quantum of recovery remains the same, irrespective of the person of the claimant. Judgment of Dec. 18, 1942, 170 RGZ 246.
180. Id. at 92.
181. Id. at 102-05. This decision then brings German law in line with our own case law, which permits a buyer who has resold defective goods to recover the damage he has paid or is probably liable to pay to a subvendor. 3 Williston, Sales § 615a (rev. ed. 1948).
182. Isele, Ein halbes Jahrhundert deutsches Bürgerliches Gesetzbuch, 150 áp 1-3 (1949); see F. Wieacker, Das Sozialmodell der klassischen Privatrechtsge-setzbücher und die Entwicklung der modernen Gesellschaft (1953).
a system of elaborate casuistic details. The German Civil Code is far from being a closed system. It contains innumerable safety valves. A daring court is, therefore, not prevented from experimenting and, particularly, from abolishing the differentiation between faulty design and miscarriage of the manufacturing process situations.\textsuperscript{183} It is too early to forecast coming innovations in case law, but there are some indications of a tendency to reform the system from within. The concluding sentence of the opinion of the Bundesgerichtshof in the leather belt case contains a remarkable observation in the form of a question. It asks whether the ultimate consumer of a product which has reached him through an anonymous chain of distributors should not be protected in his reliance on the quality of goods as advertised.\textsuperscript{184}

All suggestions for the reform of German law have one feature in common: to break with the subjectivist tradition still prevailing in the law of torts and of contracts. Advocates of the tort approach to products liability have suggested either an extension of the principle of Gefährdungshaftung\textsuperscript{185} or a strengthening of the existing tendencies toward an objective theory of negligence. They have denied that in terms of negligence there is any difference between defects caused by faulty design and miscarriage of the manufacturing process.\textsuperscript{186} Advocates of a contract approach have pleaded for the recognition of a new category of contract, the so-called faktisches Vertragsverhältnis. Their aim is to find an “implied-in-fact contract without mutual consent” between producer and consumer to establish privity.\textsuperscript{187} Others, taking account of the facts of modern merchandising have invoked the principle that legitimate expectations of the consumer with regard to quality deserve recognition by a broad principle of liability based on reliance.\textsuperscript{188} Occasionally, the whole fault principle has been put in question, but the advocates of increased liability are not prepared to suggest the imposition of liability for harm which was unforeseeable on the basis of existing scientific or technical knowledge at the time of marketing.\textsuperscript{189}

\begin{enumerate}
\item Snarrs, \textit{supra} note 7, at 72-73; Lorenz, \textit{Länderbericht}, \textit{supra} note 159, at 71.
\item Judgment of July 10, 1963, 40 BGHZ 91, 108.
\item Gernhuber, \textit{Haftung des Warenherstellers, supra} note 20; see Snarrs, \textit{supra} note 7, at 83.
\item Snarrs, \textit{supra} note 7, at 72-73.
\item This theory should not be unfamiliar to the American reader. \textit{See} Costigan, \textit{Implied-in-Fact Contracts and Mutual Assent}, 33 \textit{Harv. L. Rev.} 376, 383 (1920).
\item Lorenz, \textit{Warenabsatz, supra} note 20.
\item \textit{See} id. at 10; Lorenz, \textit{Länderbericht, supra} note 159, at 17, 53. At the time of this writing, criminal and civil proceedings have begun in Germany against certain executives of the manufacturer of thalidomide (Contergan), apparently on the basis of negligence.
\end{enumerate}
The French Law

Under French law, the consumer is better taken care of than under German law. Indeed his protection is similar to that provided by American law. But the emphasis of French products liability law is on contractual rather than tort remedies.

Contract Liability. The French Civil Code imposes liability for defects which the seller either knew or should have known about (vice caché); it distinguishes between an “innocent” seller and one with knowledge, le vendeur de bonne and le vendeur de mauvaise foi. The “innocent” seller in addition to hisaedilitian liability is only obligated to compensate the buyer for the “frais occasionnés par la vente,” the expenses occasioned by the sale. But the seller with knowledge of the defect is liable for “tous les dommages et intérêts” in addition to the purchase price. He must pay all losses incurred (damnum emergens) and gains prevented (lucrum cessans), even if not foreseeable (imprévisible).

But the distinction between sellers of good faith and those of bad faith has suffered erosion. Case law has broadened the liability of innocent sellers to cover reliance damages, including the damages the buyer has to pay victims injured by the defective product. A bold decision of the Cour de Cassation rendered in 1925 has reinforced this

A bill drafted by the Ministry of Justice provides for a change in BGB section 831. It removes the employer’s immunity from liability even if he was not at fault, but requires fault on the part of the employee. SOERGEL—SEBERT, supra note 44, at § 831, Bem. 1. 190. C. Civ. arts. 1643, 1645, 1646. The buyer is also not protected if he should have known of the defectiveness.

191. *I.e.*, rescission or price diminution. The latter, though not mentioned in article 1645, is available according to the literature. 2 A. COLIN—H. CAPTAIN, COURS ELEMENTAIRE DE DROIT CIVIL FRANÇAIS No. 929 (10th ed. L. Juliet de la Morandière 1948); 3 H. MAZEAUD, LEÇONS DE DROIT CIVIL No. 988 (1960).

192. C. Civ. art. 1646.

193. C. Civ. art. 1645. French law in this respect follows civilian (Roman) tradition, J. JÖRS—W. KUNKEL—L. WENGER, ROMISCHES PRIVATRECHT § 124 (5th ed. 1949). In contrast to German law (BGB § 463) knowledge of the defect is sufficient; fraudulent concealment is not required. If the seller was guilty of the latter, the buyer can have the contract annulled by court action and can recover damages in tort. C. Civ. arts. 1103, 1117, 1382.


196. Ducoudré v. Sebert, [1848] D.P. I. 187, [1848] S. Jur. I. 705 (Cass. req.). Suit by a buyer, a dealer in fertilizer, against his seller. The plaintiff because of the poor quality of the product had been successfully sued by farmers, his sub-vendees, for crop losses. The plaintiff demanded recovery of the amount of the judgments against him, the cost of litigation, and resale and loss of profits. Despite the “innocence” of the defendant the Cour de Cassation affirmed the judgment below in favor of plaintiff, except for the claim for lost profits.
trend. According to the memorandum submitted to the court by its rapporteur this liability is but a "logical extension" of the principle that the buyer has to be put in the position he would have been in had there been no contract. Conceding that the legislator did not have this situation in mind when drafting this statute, he argued: "New situations demand new rules. We have the text of the statute before us and the courts have the privilege and the duty to adapt it to changes in the social situation.”

To narrow the gap still further, a constant flow of decisions has treated a professional seller as a seller with knowledge, and, most importantly, the famous maxim unus quisque peritus esse debet artis suae, which forms the basis of this development, has been applied to manufacturers and dealers alike, including retailers. Since, according to prevailing view, the maxim creates an irrebuttable presumption, French law has approached, if not reached, strict liability and has made as has our law, a distinction between professional and non-professional sellers. Furthermore, French law, in another striking parallel with our law of strict liability, does not permit the professional seller to insulate himself by exculpation clauses. Finally, no distinction is made between defects caused by faulty design and those caused by miscarriage of the manufacturing process.

Given this background of the seller’s responsibility for defective quality, the injured consumer has typically sued his immediate seller, who has sued his seller in turn, until finally the manufacturer was

198. Id. at 12 (rapport de M. le cousser Célice).
204. Id., comment m.
reached. French law of civil procedure permits the defendant seller at any time during the pendency of the lawsuit before the court of first instance to implead his seller with the help of a so-called "appel en garantie." With the help of this device the liability of the initial seller is directly extended to the last buyer.

Instead of suing his own seller, the consumer is entitled to sue the so-called "vendeur primitif" directly in contract. This action directe anchored in venerable tradition is based on the notion that a seller in reselling a commodity impliedly assigns to his buyer all the rights he has against his predecessor by virtue of the ownership of the commodity. It appears that the action directe is rarely used today: its value is reduced by the requirement of a "brief delay," and impleader is generally sufficient to reach the initial seller.

**Tort Liability.** The main function of tort law is to protect persons outside the distributive chain. But tort liability presupposes fault. Such high standards of care are required, however, where the tortfeasor is a professional, that tort liability approximates strict liability. And case law has developed a provision of the Civil Code which makes the "guardian of a thing" strictly liable for damages caused by its defective qualities. The "guardian" who is liable will in turn seek

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208. C. Pro. Civ. art. 183. The code does not contain detailed provisions about impleading. The gaps have been filled by case law which permits impleader whenever the defendant's liability is based on facts which would make the party impleaded liable to claim for reimbursement. In the field of products liability this is the case when the defect which forms the basis of the main suit was already present at the time the first sale had taken place. I E. Glasson & A. Tissier, Traité théorique et pratique d'organisation judiciaire, de compétence et de procédure civile Nos. 252-57 (3d ed. 1922).
209. 10 Planiol-Ripert-Hamel, supra note 194, No. 138.
212. C. Civ. art. 1615.
213. The determination whether the requirement of a "brief delay" has been complied with is within the discretion of the trial court. Compagnie métallurgique et charbonnière belge v. Chemin de fer du nord, [1885] D.P. I. 357, [1886] S. Jur. I. 149 (Cass. civ.) (juge du fait); C. Civ. art. 1648.
214. For the availability of a tort remedy in lieu of or cumulatively with a contractual claim, see 2 Colin-Capitant, supra note 191, No. 1272; 1 Mazdeaud-Tung, supra note 195, No. 173; I R. Savatier, Traité de la responsabilité civile en droit français civil, administratif, professionnel, procédural Nos. 148-60 (2d ed. 1951).
215. The liability of an employer for torts of his servants (préposés) under the Civil Code corresponds to our law. C. Civ. art. 1384.
216. C. Civ. art. 1384, para. 1.
reimbursement from his contractual predecessor until finally the manufacturer is reached.

Public Policy

The victory of the fault principle over strict liability, which, due to the influence of Roman law, occurred earlier in the civil than in the common law, was justly hailed as a great advance in the history of tort law. It meant a significant increase in man's freedom of action without sacrificing the great goal of tort law: minimization of accident costs. The establishment of the fault requirement freed enterprises from the stifling costs of non-fault accidents which were an inevitable accompaniment of the rapid growth of industry. Strict liability, we are told by our case law of that period, would "deprive our land of the benefits and promises of industrial expansion."218 Similar arguments were made in civil law countries.219

Accidents not negligently caused, according to classical theory, are an inevitable part of the risk of living and have to be borne by the victim.220 It is up to each individual to minimize the risk inherent in the use of goods by careful shopping for the safest possible product and by taking out insurance against inevitable risks. Informed market choices will, in the long run, put pressure on enterprises steadily to improve their product and will tend to eliminate unsafe products.221

However convincing these arguments were to preceding generations, they have begun to lose their appeal within the last decades.222 Even in Germany, exceptions have been grafted upon the negligence requirement.223 Enhanced social concern for and awareness of the plight of

controll'd," served a glass of the wine to a friend. The latter died of internal burns because the bottle contained a corrosive substance. The donor was held liable as guardian. He in turn had a claim over in contract against the conductor of the lottery.

218. Calabresi, Some Thoughts on Risk Distribution, supra note 9, at 516; see Losee v. Buchanan, 51 N.Y. 476, 484-85 (1873): "We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay [sic] at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands."

219. See generally Esser, Grundlagen & Entwicklung, supra note 140, §§ 4-6; Simitsis, supra note 7, at 80-81.

220. BLUM & KALVY, supra note 76, at 61 and passim; Esser, Grundlagen & Entwicklung, supra note 140.

221. Speidel, supra note 78, at 810.

222. Public sentiment in favor of strict liability proved stronger than the counsel of those who argued that imposition of strict liability would impede progress.

223. See notes 140, 160 and accompanying text supra.
the victim has led to a dilution of negligence and by almost imperceptible steps to the emergence of strict liability. Social welfare, it is now said, cannot be measured in terms of private returns and outlays only; "disservices" caused by productive activities have to be taken into account.\textsuperscript{224} An industry not charged for the social cost of non-fault accidents caused by its defective products receives a subsidy from its victims while the buyer of a product will not pay for its "true" costs.\textsuperscript{225} A misallocation of resources will follow.\textsuperscript{226}

Ideas derived from welfare economics thus directly or indirectly exercised a significant influence on the law of products liability, particularly in this country. They have led to the conviction, not always clearly articulated, that, irrespective of the victim,\textsuperscript{227} all injuries caused by defective products should be treated as social and not as private costs.\textsuperscript{228} Thus economic reasons support a defence of strict liability in terms of fairness—an equitable distribution of losses.\textsuperscript{229}

Since our impressive literature on the policy goals of strict liability seems to have no counterpart in civil law countries, the discussion which follows will mainly rely on American sources.

Some of the reasons for the shift in public philosophy in our country are conveniently summarized in a comment\textsuperscript{230} to section 402A of the \textit{Restatement (Second) of Torts} which reads as follows:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which

\textsuperscript{225} Calabresi, \textit{Some Thoughts on Risk Distribution}, supra note 9, at 531.
\textsuperscript{226} Id. at 530.
\textsuperscript{227} \textit{Restatement (Second) of Torts} § 402A applies to consumers and users, irrespective of whether or not they are buyers. There is even some tendency to protect the bystander by strict liability. Note, \textit{Strict Products Liability and the Bystander}, 64 Colum. L. Rev. 916 (1964). \textit{But see} Mull v. Ford Motor Co., CCH Products Liability REP’L 5647 (2d Cir. 1966).
\textsuperscript{228} According to the \textit{Restatement (Second) of Torts}, section 402A, comment m, no disclaimer is permitted even between the parties in a bargaining situation. For a recent discussion of the dichotomy between social and private costs, see Coase, supra note 224.
\textsuperscript{229} 14 De Paul U.L. Rev. 488 (1965).
\textsuperscript{230} \textit{Restatement (Second) of Torts} § 402A, comment c (1965).
liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

The comment in justifying the rule does not talk only in vague generalities. Realistically, it stresses the effects of modern merchandising and mass advertising and the justifiable understanding of consumers and users. When the manufacturer-seller holds himself out as an expert, it is not unfair to take him at his word and to treat him as such. In the language of the French literature, unus quisque peritus esse debet artis suae. To be sure, consumers as a class are not unaware of the existence of defective goods, but however much any known history of bad accidents may adversely affect the choice of “accident prone” products, marketing techniques attempt, on the whole successfully, to make sure that fear of accidents does not influence consumer choice.

The comment speaks of products which the public needs and for which it is “forced to rely on the seller.” This awkward phrase is not meant to refer to a seller who enjoys a monopoly but rather to the imbalance of expertise between seller and consumer. This imbalance is due to factors such as the consumer’s lack of technical knowledge, his inability to evaluate the quality of many goods, and his lack of opportunity to inspect due to the rapid flow of goods. Most importantly, a defect frequently manifests itself only by use. The manufacturer, by contrast, is or should be much better able to judge the quality of the items which he produces and the statistical probability of a defect.

Liability, according to the comment, does not unfairly burden the manufacturer. “[P]ublic policy demands that the burden of accident injuries [should] be treated as a cost of production against which liability insurance can be obtained.” No explanation, economic or otherwise, is given for making all accident costs enterprise costs by

232. See note 200 and accompanying text supra.
235. Speidel, supra note 73, at 811.
237. “In effect, the ordinary contracts of sale are contracts of adhesion, presented to consumers under conditions of haste, ignorance, and compulsion.” Id. at 328.
238. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).
To find a justification, we have to go back to the classic statement on strict products liability: the concurring opinion of Justice Traynor (as he then was) in *Escola v. Coca Cola Bottling Company*.

Even if there is no negligence, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Products liability, according to Justice Traynor, now attempts to achieve not only compensation and deterrence, but also the proper allocation of resources. The manufacturer can either control the risk of defective products or can equitably distribute losses among all potential victims. He is strategically located to act not only as risk gatherer but also as risk distributor. Strict liability, therefore, is a good deal fairer than letting fate select the victim at random and letting him bear the full loss by denying him compensation; the seller by raising his price, spreads the loss over the community of consumers. The price paid by each consumer contains a small premium for accident insurance. To be sure he is forced to take out insurance with the seller but this compulsory form of insurance is more efficient than for

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239. "The allocation of costs is always avowedly instrumental. Only if we specify the goals can the economist tell us what is the proper allocation of costs." BLUM & KALVEN, supra note 76, at 57.


241. See generally Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 Yale L.J. 216, 223-25 (1965); Calabresi, Some Thoughts on Risk Distribution, supra note 9, at 500-17.

242. BLUM & KALVEN, supra note 76, at 59. The same arguments have been advanced in the German literature. E.g., ADOLFF, supra note 21, at 216-17.
each individual to take out his own insurance policy.\textsuperscript{243} The compulsory nature of this state of affairs seems less strange when we remember that the mechanism of risk distribution employed under strict liability is not fundamentally different from that existing under the fault system. Here, too, a premium appears in the price of the merchandise to protect the manufacturer against the consequences of fault liability.\textsuperscript{244} To be sure, there may be a conflict between the principles of risk bearing and risk distribution.\textsuperscript{245} The enterpriser, due to market conditions, may not be able to shift to his customers the cost of accidents and accident insurance.\textsuperscript{246} But accident costs or premiums are not different from other costs. Should an enterprise, due to market conditions, be forced out of business because its accident rate, reflected in its prices, makes its products non-competitive, its resources will be available for other endeavors so that in net effect, the nation's resources will be better allocated in terms of consumer preferences.\textsuperscript{247}

\textit{Defect Revisited.} Imposition of strict liability has been criticized because it may lead to runaway social engineering. Courts, we are told, are ill equipped to discharge their task of administering strict liability since an adversary proceeding does not lend itself to investigation of the social and economic implications and ramifications of strict liability.\textsuperscript{248} Responding to this charge, the advocates of strict liability point out that it does not amount to unlimited liability.\textsuperscript{249} In the language of a recent case, "it may fairly be said that the liability which [strict

\begin{itemize}
\item \textsuperscript{243} Calabresi, \textit{Fault & Accidents}, supra note 241, at 225. One large insurance policy is cheaper than a great number of small policies.
\item \textsuperscript{244} Ehrenzweig, \textit{Assurance Oblige—A Comparative Study}, 15 \textit{LAW & CONTEMP. PROB.} 445, 446 (1950); Calabresi, supra note 241, at 229-31.
\item \textsuperscript{245} Calabresi, \textit{Some Thoughts on Risk Distribution}, supra note 9, at 519-24; Morris, \textit{Enterprise Liability and the Actuarial Process—The Insignificance of Foresight}, 70 \textit{YALE L.J.} 554, 585 (1961), Plant, supra note 76, at 946.
\item \textsuperscript{246} To the extent that today competition is competition in research, big business has a decided advantage over small business. \textit{Simittis}, \textit{supra} note 7, at 56-58.
\item \textsuperscript{247} The dire predictions with regard to the future of Cutter Laboratories resulting from the substantial number of claims against it, 13 \textit{STAN. L. REV.} 645, 648 (1961), have not materialized.
\item \textsuperscript{248} Cochran v. Brooke, 409 P.2d 904, 907 (Ore. 1966): "It is, indeed, easy for compassion to dictate an absolute liability against the makers of a product that can cause blindness. But once the liability is imposed, it could not be judicially limited only to cases involving disastrous consequences. An upset stomach caused by taking aspirin would, as well, entitle the user to his measure of damages. We can agree with the plaintiff that social justice might require that the price of the drugs should include an amount sufficient to create a fund to compensate those who suffer unanticipated harm from the use of a beneficial drug. But this kind of a system of compensation is beyond the power of a court to impose." \textit{See also} Connolly, \textit{The Liability of a Manufacturer for Unknowable Hazards Inherent in his Product}, 82 \textit{INS. COUNSEL J.} 303, 306 (1965).
\item \textsuperscript{249} "By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory." Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 37 (9th Cir. 1965).\end{itemize}
Products Liability

liability] imposes is hardly more than what exists under implied warranty when stripped of contract doctrine of privity, disclaimer, requirement of notice of defect and limitations through inconsistencies of express warranties.”250 The identification of “unreasonably dangerous” with unmerchantable products might stifle the evolution of products liability, unless we constantly keep in mind that merchantability is a highly flexible concept, capable of expansion.251 To be sure, strict liability does not commit us to saying that products must be incapable of doing harm, must measure up to absolute perfection or not wear out.252 They should be regarded as not defective so long as they are “safe for normal handling and consumption;”253 otherwise their cost would be prohibitive. In the language of a comment to section 402A of the Restatement (Second) of Torts, a product is defective only when it does not measure up to the quality “contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its character.”254 We are also not committed to holding tobacco products unreasonably dangerous; in view of the now patent risks of smoking, liability should not be imposed in favor of the smoker who contracts cancer, except in cases of misleading advertising.255

But the case law should keep up with the progress of technology, the legitimate expectations of society, and its changing notions of justice.256

252. It goes without saying that not all unmerchantable products are unreasonably dangerous. In some consumer products liability cases, warranties of merchantability and of fitness will be synonymous. Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 392, 175 N.E. 105, 106 (1931).
253. But see Traynor, supra note 251, at 371.
254. The consumer will spend so much on safety as to make increases in safety equal to savings on accidents.

For a list of factors to be considered, see Wade, supra note 75, at 17. He suggests to take into consideration: “(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability
Defect must remain an accordion-like, open-ended term. The faulty design concept, to give an example, is quite capable of expansion in accordance with stricter notions of safety. Case law should be able to require, for instance, even more safety features in cars, particularly when the courts can borrow from and supplement standards set up under federal legislation.\(^2\) In the field of drug marketing, defining the outer limits of strict liability presents us with most difficult questions of policy. Should drug companies not bear liability for harm that no "developed human skill or foresight" could anticipate?\(^2\) This position has been thoughtfully defended since only calculable risks lend themselves to the principle of insurance and risk spreading.\(^2\) But imposition of liability for "unknowable" side effects of a drug may be regarded as socially desirable even under risk spreading so long as the injury can be called, in the language of Ehrenzweig, a loss "typically" caused by the industry.\(^2\) Still, the history of vaccination against rabies and smallpox should make us aware that there are inevitably unsafe products whose benefits far outweigh their dangers.\(^2\) Consumers for a
long time have lived with and accepted the risks inherent in their use. It makes eminent good sense to follow the Restatement and not to call these products unreasonably dangerous provided their distribution is accompanied by adequate warning. The Restatement, however, significantly adds:

The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

One can agree with the Restatement that an experimental drug is not unreasonably dangerous per se. Sufficient user experience is indispensable to research and making the supplier a guarantor of safety without such research may be regarded as too burdensome. But it should be emphasized that the exception from liability presupposes proper preparation and marketing with proper warning. The courts in giving meaning to these requirements should not be bound by the guidelines set up in FDA regulations. These regulations setting up minimum standards are not even foolproof for "established" drugs, let alone experimental drugs. A thoughtful comment, has suggested that a ser-

262. Restatement (Second) of Torts § 402A, comment k (1965).
264. Federal Food, Drug and Cosmetic Act § 505(a), (b), 21 U.S.C. § 355(a), (b) (1964). Section 505(d) sets forth the grounds upon which the Secretary may refuse to approve the application. 21 U.S.C. § 355(d) (1964).
265. Gottsdanker v. Cutter Laboratories, Inc., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (the standardized precautionary measures were found inadequate only after the Cutter vaccine was withdrawn from the market); Comment, Strict Liability for Drug Manufacturers, supra note 263, at 647. Contra, Lewis v. Baker, 413 P.2d 400 (Ore. 1965): manufacturer of MER/29, a prescription drug, held not liable in breach of warranty for alleged side effects of drug, since the drug had been approved by the FDA, was properly tested, labeled with proper warning, and there was no evidence of fraud or culpable non-disclaimer in obtaining or retaining FDA approval. Prior to final approval a drug is called experimental, after approval it is called established.
viceable set of guidelines is furnished by the Nuremberg Code of Ethics in Medical Research and has advocated that the defendant should be required to prove that he has fully complied with its principles.

Assumption of Risk. The possible tension between the tort approach to disclaimers followed in the Restatement and the contract road used by the Uniform Commercial Code raises a fundamental question as to the proper role of disclaimers in a system of enterprise liability. At first glance, all the arguments in favor of strict liability appear to militate against permitting disclaimers. Strict liability, in fact, was invented as a reaction not only against the defense of privity but also against obnoxious disclaimers. And yet, it is hard to see why enterprise liability should not be reconcilable with honoring "informed choice." Even the Restatement, which denies effectiveness to disclaimers, permits the defense of voluntary assumption of risk. Indeed, there seems to be no reason why seller and buyer should not be free to bargain about the allocation of risks. The sale of experimental products in a commercial setting immediately comes to mind.

It is very tempting to draw the line between what is permissible and what is not by differentiating between commercial and consumer sales. Consumer sales are typically characterized by absence of bargaining. The need for rapid flow of consumer goods makes dickering about quality and disclaimer with its attendant costs unrealistic. Still, drawing a hard and fast line between consumer and non-consumer sales seems undesirable. It is enough to restrict disclaimers to situations when it can be reasonably said that the consumer has freely assumed the risk.

An attempt to draw the line between physical and commercial losses is equally unpersuasive. Take the sale of a secondhand car, for instance, where the buyer was injured because the brakes were defective. Assuming that sales of secondhand goods are covered by the Restatement rule, there seems to be no need for protecting the buyer pro-

267. Though drafted to aid in the Nuremberg trials of Nazi war criminals, they have had a strong influence on subsequent ethical codes. The Comment cited supra note 266 gives the text of the code, at 46-56.
268. See text at note 106 supra.
269. Shanker, supra note 69, at 19.
271. Restatement (Second) of Torts § 402A, comment n (1965); see Prosser on Torts 461.
272. Seely v. White Motor Co., 63 Cal. 2d 9, 28 n.7, 403 P.2d 145, 158 n.7, 45 Cal. Rptr. 17, 30 n.7 (1965) (concurring and dissenting opinion of Peters, J.); see note 108 supra. See also Calabresi, Some Thoughts on Risk Distribution, supra note 9.
274. Id. at 15-16, 403 P.2d at 149-50, 45 Cal. Rptr. at 21-22.
vided he is given full information. Voluntary assumption of risk without express disclaimer should equally be available as a defense to the seller of a new product if the buyer was fully aware of the danger attendant to the use of product, provided the product is not "essential to a basic standard of living." This is one of the lessons to be gained from Henningsen v. Bloomfield Motors Incorporated. On the other hand, a buyer who has the choice between two products, one subject, the other not subject, to disclaimer is not in need of protection if he is injured, provided the disclaimer is clear enough. The same is true for the availability of the defense of voluntary assumption of risk. A buyer who refuses, for instance, an optional safety belt should not be heard if he complains that he was thrown against the windshield.

This leads us to an intriguing speculation: should disclaimers be permitted if they are paid for by price differentials? It is well known that many a commodity is sold with warranties of different duration; automobiles are sold with different optional safety features. The existing variations in warranties and safety features are reflected in different prices. Should sellers be permitted to apply this technique of differentiation to disclaimers generally and to give the buyers an option to buy a product for a price without disclaimer, or at a reduced price with disclaimer? Such a system might be feasible with regard to commodities where records are kept of each individual seller's transaction, e.g., the sale of automobiles. But there seem to be unsurmountable obstacles to applying such a mixed system. The sale of dangerous products does not fall into the bargaining pattern envisaged in Mr. Coase's analysis: it involves multiple parties. The seller cannot predict who is going to be hurt by a defective product. It may be the buyer, a member of the buyer's family, a companion who is given a ride

281. Coase, supra note 224.
or even a bystander (provided strict liability extends to the bystander). Realistically, therefore, the seller is unable to quote the relevant prices. Even in the sale of cars, the system would work only if buyers were required to take out insurance for the protection of third parties.

Moreover, it may be difficult to determine whether a disclaimer was really bargained for. It is easy to find a fair bargain where the customer was offered identical cars with or without a safety belt. But a car manufacturer may not make a particular model with a collapsible steering column. A disclaimer should not be available against an injured buyer of such a car with a non-collapsible column solely because he could have bought another manufacturer's product which did contain the safety feature. The two products might not have been close substitutes. In fact, in choosing the other car because it had a collapsible steering column, the consumer might have had to accept some unrelated unsafe feature.

Should manufacturers of unavoidably unsafe products such as anti-rabies vaccine be free from liability to knowing users? These products are sure to cause injury at present to some users, but continued experimentation could lead to improvement. Use of the anti-rabies drug is in one sense a risk of living, and to this extent there is no reason to impose liability on the manufacturer. If we feel that injured users should be compensated, the government should grant them awards. But to the extent that we feel that liability imposed on the manufacturer would deter experimentation, injured consumers are not merely assuming a risk of living; they are assuming a cost of experimentation and are thereby subsidizing all those who benefit by experimentation and improvement. This community of beneficiaries includes the entire public, both users and non-users of the unsafe products; therefore the government ought to subsidize the industry by compensating the victims. But if the government refuses to subsidize the costs of experimentation, then the companies should be liable to injured users; they can pass the cost along to all drug users, and it is preferable that this large group of beneficiaries bear the cost instead of the injured victims.

The Dominant Party. The emergence of strict liability has invited

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282. See note 227 supra.
courts and literature to develop a workable theory for determining a party best able to serve as risk gatherer and distributor. Recent case law has shown the need for revising the standard answer that the loss should be placed on the "dominant party."\textsuperscript{285} In \textit{Goldberg v. Kollsman Instrument Corporation},\textsuperscript{286} for instance, the majority and minority disagreed on this very issue. At stake was the liability of the air carrier, of the assembler and of the manufacturer of a component part for the death of an airplane passenger. The carrier having settled out of court,\textsuperscript{287} the New York Court of Appeals had to deal only with the liability of the assembler and the manufacturer of the allegedly defective altimeter. According to the majority of the court, the assembler which put the completed aircraft into the market\textsuperscript{288} should be regarded as the dominant party. Since this gave passengers adequate protection, the court felt it unnecessary "for the present at least" to extend enterprise liability to the co-defendant, the manufacturer of the component part.\textsuperscript{289} But the dissenters, while considering the carrier to be dominant, would have preferred to let the passengers bear the risk. They cited, in support of this view, rigorous federal inspection, public awareness of the risks involved and the availability of flight insurance. Liability, they claimed, would not in this case "accord with the rationale upon which the doctrine of strict liability rests."\textsuperscript{290}

The purpose of such liability is not to regulate conduct with a view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the

\textsuperscript{285} The expression was coined by the late dean of the Yale Law School, Harry Shulman.


\textsuperscript{287} Brief for Defendant Kollsman at 9.

\textsuperscript{288} 12 N.Y.2d at 497, 191 N.E.2d at 82-83, 240 N.Y.S.2d at 594-95.

\textsuperscript{289} Id. It appears that the dissenters felt that Kollsman was not held liable because it was not guilty of lack of due care.

\textsuperscript{290} Id. at 498-99, 191 N.E.2d at 83-84, 240 N.Y.S.2d at 595-96. Relying on the availability of flight insurance is utterly unrealistic in light of the high cost of flight insurance to the individual passengers as contrasted with the company.
cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service. As applied to this case we think the enterprise to which accidents such as the present are incident is the carriage of passengers by air.

Whatever conclusions may flow from the fact that the accident was caused by a defective altimeter should be merged in whatever responsibility the law may place on the airline with which plaintiff did business.

... [A]ny claim in respect of an airplane accident that is grounded in strict enterprise liability should be fixed on the airline or none at all.

Since the imposition of strict liability on an airline would amount to casting aside "well established law in deference to a theory of social planning that is still much in dispute," re-evaluation of the liability of the air carrier should be left to the legislature.

The search for a refined theory of dominance has reopened the issue of the social desirability of holding the middleman strictly liable. The case law has held him liable in order ultimately to reach the dominant party; the doctrine may now no longer be necessary. This is particularly true where the middleman has no means of discovering a defect. Should a retailer of canned food, for instance, be held liable if a can is spoiled, a retail druggist if a prescription drug turns out to have side

291. Id. at 440-41, 191 N.E.2d at 85-86, 240 N.Y.S.2d at 598-99.

292. The court said further: "Our reluctance to hold an air carrier to strict liability for the inevitable toll of injury incident to its enterprise is only the counsel of prudence. Aside from the responsibility imposed on us to be slow to cast aside well-established law in deference to a theory of social planning that is still much in dispute (Prosser, Torts [2d ed.], § 84; Patterson, The Apportionment of Business Risks through Legal Devices, 24 Colum. L. Rev. 335, 358; Pound, Introduction to the Philosophy of Law 100-104 [1954]), there remains the inquiry whether the facts fit the theory. It is easy, in a completely free economy, to envision the unimpeded distribution of risk by an enterprise on which it is imposed; but how well will such a scheme work in an industry which is closely regulated by Federal agencies? In consideration of international competition and other factors weighed by those responsible for rate regulation, how likely is it that rate scales will rise in reflection of increased liability? (See Pound, supra, pp. 102-103.) In turn, how likely is it that the additional risk will be effectively distributed as a cost of doing business? Such questions can be intelligently resolved only by analysis of facts and figures compiled after hearings in which all interested groups have an opportunity to present economic arguments. These matters, which are the factual cornerstones supporting the theory adopted by the majority, aside from our view that they apply it to the wrong enterprise, are clastically within the special competence of the Legislature to ascertain. For a court to assume them in order to support a theory that displaces much of the law of negligence from its ancestral environment involves an omniscience not shared by us. For a court to apply them, not to the enterprise with which plaintiff dealt and relied upon, or to the enterprise which manufactured the alleged defective part, but to the assembler of the aircraft used by the carrier, involves a principle of selection which is purely arbitrary." Id. at 442-43, 191 N.E.2d at 86-87, 240 N.Y.S.2d at 599-600.

293. See the attitude of the German Reichsgericht, note 164 supra.
Products Liability

effects. "Long-arm" statutes enlarging personal jurisdiction have further reduced, it seems, the need for holding the retailer liable. Nevertheless, it still has its most vocal defenders even today. In Mr. Justice Traynor's words:

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end. The retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and the retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants for they can adjust the costs of such protection between them in the course of their continuing business relationship.

And even the critics of the distributor's strict liability differentiate between the small retailer and large enterprise which distributes the products of small manufacturers whom it employs.

Summary

In the field of products liability, common and civil law are not far apart and the gap is constantly narrowing. However much they may differ in details, all systems show a clear tendency to put the ultimate burden of responsibility for harm done by defective products on the enterprise to which the defect can be traced. To be sure, the technique of achieving this result varies. Our law is increasingly making direct recovery available against the enterprise responsible for the defect irrespective of privity; other legal systems still appear to utilize to a considerable extent the process of unraveling the chain of transactions backward.

Most importantly, in imposing strict (enterprise) liability, our law is not much out of line. A short recapitulation of fact situations which typically recur in the field of products liability will make this quite clear. Adapting the classification recently used in a brilliant German

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295. For their discussion, see F. James, Civil Procedure § 12.10 (1965).
study, it may be said that the case law imposing enterprise liability has dealt with the following categories: products which are dangerous, either because of faulty design and composition or because of miscarriage of the manufacturing process, products not defective as such but whose use may be unsafe without proper direction or warning, products which are regarded as safe in terms of available knowledge when they enter the stream of commerce but which turn out to be harmful on the basis of subsequent scientific discovery, and finally unavoidably unsafe products. Production and marketing of unavoidably unsafe goods do not entail liability. The same, broadly speaking, seems to be true for goods regarded as safe on the basis of all available knowledge. In this area, however, it is quite possible that liability might be expanded in a legal system subscribing to strict liability. Furthermore, all legal systems have imposed elaborate duties to give directions or warning to prevent unsafe use. Typically, they distinguish roughly between fully obvious and latent defects, and fail to accord protection against dangers generally known and appreciated, or known to the injured consumer or user. Even with regard to the remaining categories the fault principle has not stood much in the way of uniform treatment. In French law, as we have seen, products liability of the professional is based on negligence in name only; with the help of an irrebuttable (?) presumption of fault strict liability is achieved. Even in Germany, the fault requirement has suffered erosion: the marketing of goods which are dangerous because of faulty design or composition constitutes negligence per se, but German law still insists that liability for goods which are defective because of a miscarriage of the manufacturing process presupposes negligence. But this exception to the general attitude may well be on its way out. Strict liability is finding an increasingly large number of advocates who only differ as to the method of accomplishing it. The policy arguments advanced for strict liability and the objections to strict liability closely resemble those advanced in this country.

298. Lorenz, Länderbericht, supra note 159, at 7-9.